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United States of America

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL DAVID BRACE,

Defendant.

CASE NO. 1:21-CR-00055-JLT-SKO

STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
ORDER

PROPOSED DATE: January 18, 2023
TIME: 1:00 p.m.
COURT: Hon. Sheila K. Oberto

This case is scheduled for a status conference on December 21, 2022, but the parties have agreed to move this hearing to January 18, 2023. On May 13, 2020, this Court issued General Order 618, which suspended all jury trials in the Eastern District of California “until further notice.” Under General Order 618, a judge “may exercise his or her authority to continue matters, excluding time under the Speedy Trial Act with reference to the court’s prior General Order 611 issued on March 17, 2020 . . . with additional findings to support the exclusion in the Judge’s discretion.” General Order 618, ¶ 6 (E.D. Cal. May 13, 2020). In addition, any judge “may order case-by-case exceptions” to General Order 618’s provisions “at the discretion of that Judge or upon the request of counsel, after consultation with counsel and the Clerk of the Court to the extent such an order will impact court staff and operations.” General Order 618, ¶ 7 (E.D. Cal. May 13, 2020). The court issued General Order 655 on September 20, 2022, which found that public health conditions had not improved significantly and justified an additional ninety-day extension of previous orders related to court proceedings.

1 These orders were entered to address public health concerns related to COVID-19. Although the
 2 general orders address district-wide health concerns, the Supreme Court has emphasized that the Speedy
 3 Trial Act’s end-of-justice provision “counteract[s] substantive open-endedness with procedural
 4 strictness,” “demand[ing] on-the-record findings” in a particular case. *Zedner v. United States*, 547 U.S.
 5 489, 509 (2006). “[W]ithout on-the-record findings, there can be no exclusion under” § 3161(h)(7)(A).
 6 *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at 509; *see also United States v.*
 7 *Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a judge ordering an ends-of-
 8 justice continuance must set forth explicit findings on the record “either orally or in writing”).

9 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory
 10 and inexcusable—the general orders require specific supplementation. Ends-of-justice continuances are
 11 excludable only if “the judge granted such continuance on the basis of his findings that the ends of
 12 justice served by taking such action outweigh the best interest of the public and the defendant in a
 13 speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable unless “the court sets
 14 forth, in the record of the case, either orally or in writing, its reason or finding that the ends of justice
 15 served by the granting of such continuance outweigh the best interests of the public and the defendant in
 16 a speedy trial.” *Id.*

17 The general orders exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7). Although the
 18 Speedy Trial Act does not directly address continuances stemming from pandemics, natural disasters, or
 19 other emergencies, this court has discretion to order a continuance in such circumstances. For example,
 20 the Ninth Circuit affirmed a two-week ends-of-justice continuance following Mt. St. Helens’ eruption.
 21 *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court recognized that the eruption made it
 22 impossible for the trial to proceed. *Id.* at 767-68; *see also United States v. Correa*, 182 F. Supp. 326,
 23 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the September 11, 2001, terrorist attacks
 24 and the resultant public emergency).

25 The coronavirus pandemic poses a similar, albeit more enduring, “appreciable difficulty” to the
 26 prompt proceedings mandated by the statutory rules. Recently, the Ninth Circuit enumerated a “non-
 27 exhaustive” list of seven factors it found to be “relevant” in considering ends-of-justice Speedy Trial Act
 28 continuances “in the context of the COVID-19 pandemic.” *United States v. Olsen*, 21 F.4th 1036, 1047

(9th Cir. 2022). That non-exhaustive list includes: (1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked speedy trial rights since the case's inception; (4) whether a defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district court has the ability to safely conduct a trial. *Id.*

In light of the societal context created by the foregoing, this court should consider the following case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7). When continued, this court should designate a new date for the hearing. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be "specifically limited in time").

Plaintiff United States of America, by and through its counsel of record, and defendant, by and through defendant's counsel of record, accordingly stipulate as follows:

1. By previous order this matter was set for a status conference hearing on December 21, 2022. The Court more recently has invited a continuance of this hearing if counsel do not believe that anything substantial can be accomplished at the currently scheduled hearing.

2. By this stipulation, the parties agree that the next status conference be scheduled for January 18, 2023, and to exclude time between December 21, 2022, and January 18, 2023, under 18 U.S.C. §§ 3161(h)(7)(A) and 3161(h)(7)(B)(i), (ii) and (iv).

3. The parties agree, and request that the Court find the following:

a) A continuance is required to permit the defendant to seek appointment of different counsel. Although he had retained current counsel, more recently health issues complicated that representation and prevent continued representation.

b) Counsel for defendant is in the process of withdrawing from all pending cases, and his office has been overwhelmed with the administrative tasks associated with winding down a practice that has been ongoing for decades. This matter had been scheduled for a change of plea, but current counsel's health condition precluded counsel from making the scheduled

1 appearance for the change of plea. The court directed defense counsel's office to file a financial
2 affidavit, so the court could consider appointing different counsel, but the office needs additional
3 time to comply with that order.

4 c) The government does not object to the continuance and joins in the request.

5 d) In addition to the public health concerns cited by General Orders 611, 612, 617
6 and 655 presented by the evolving COVID-19 pandemic, an ends-of-justice delay is particularly
7 apt in this case because counsel or other relevant individuals have been encouraged to telework
8 and minimize personal contact to the greatest extent possible. It will be difficult to avoid
9 personal contact should the hearing proceed. For these reasons, the court has encouraged the
10 parties to enter this stipulation.

11 e) Based on the above-stated findings, the ends of justice served by continuing the
12 case as requested outweigh the interest of the public and the defendant in a trial within the
13 original date prescribed by the Speedy Trial Act.

14 f) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
15 et seq., within which trial must commence, the time period from December 21, 2022, to January
16 18, 2023, inclusive, is deemed excludable under 18 U.S.C. §§ 3161(h)(7)(A) and
17 3161(h)(7)(B)(i), (ii) and (iv) because it results from a continuance granted by the Court at the
18 request of the parties on the basis of the Court's finding that the ends of justice served by taking
19 such action outweigh the best interest of the public and the defendant in a speedy trial.

20 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the
21 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial
22 must commence.

23 IT IS SO STIPULATED.

24 Dated: December 17, 2022

PHILLIP A. TALBERT
United States Attorney

26
27 /s/ David Gappa
DAVID L. GAPP
Assistant United States Attorney
28

1 Dated: December 17, 2022

/s/ MARSHALL

MOUSHIGIAN

MARSHALL MOUSHIGIAN

for ROGER NUTTALL

COUNSEL FOR

MICHAEL DAVID BRACE

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ORDER

The court has reviewed and considered the stipulation filed by the parties on December 17, 2022, and also reviewed the record of this case. For the reasons stated in the stipulation the period of time from December 21, 2022, through January 18, 2023, inclusive, is deemed excludable under 18 U.S.C. §§ 3161(h)(7)(A) and 3161(h)(7)(B)(i), (ii) and (iv) because it results from a continuance granted by the Court at the request of the parties on the basis of the Court's finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

IT IS SO ORDERED.

DATED: 12/19/2022

Sheila K. Oberto

THE HONORABLE SHEILA K. OBERTO
UNITED STATES MAGISTRATE JUDGE